PD-0279-20
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 11/13/2020 7:26 AM
Accepted 11/13/2020 1:41 PM
DEANA WILLIAMSON
CLERK

NO. PD-0279-20

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
11/13/2020
DEANA WILLIAMSON, CLERK

ANDREW ANDERSON, Appellant

v.

THE STATE OF TEXAS, Appellee

From the Court of Appeals, Fifth District of Texas
Cause Number 05-19-01492-CR

STATE'S BRIEF ON THE MERITS

Counsel of Record:

JOHN CREUZOT
Criminal District Attorney
Dallas County, Texas

M. PAIGE WILLIAMS
Assistant District Attorney
State Bar No. 24043997
133 N. Riverfront Blvd., LB-19
Dallas, Texas 75207-4399
(214) 653-3633 (*Phone*)
(214) 653-3643 (*Fax*)
Marcella.Williams@dallascounty.org

ATTORNEYS FOR THE STATE OF TEXAS

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The opinion of the Court of Appeals should be upheld. Procedural rules that define requirements and timelines provide consistency and are necessary in our justice system. Specifically, the ten-day grace period of Texas Rules of Appellate Procedure 9.2(b), "the mailbox rule," is not applicable unless all three requirements are met. Anything less makes Rule 9.2 a suggestion rather than a rule. The State respectfully requests that this Court decline Appellant's invitation to interpret the term "proper clerk" as any office in the courthouse when it is filed by an incarcerated appellant and the notice actually makes it to the proper clerk, regardless of time.

STATEMENT OF THE CASE

Appellant was charged with aggravated assault with a deadly weapon, a second degree felony. (CR: 11). Pursuant to a plea bargain agreement, Appellant entered a plea of no contest on July 25, 2019. (CR: 30, 45, 48; RR2: 6). The trial court deferred adjudication and placed Appellant on eight years' community supervision. (CR: 38; RR2: 8) The State filed a motion to adjudicate on August 22, 2019, alleging that Appellant violated a condition of his probation by contacting the victim. (CR: 53, 59). On October 7, 2019, Appellant pled true to the allegation without an agreement with the State. (CR: 69; RR3: 6-7). After conducting a hearing on the State's motion, the trial court adjudicated appellant's guilt and sentenced him

to five years' incarceration in the Institutional Division of the Texas Department of Criminal Justice. (CR: 64; RR3: 36)

Appellant's notice of appeal was filed with the district clerk on December 2, 2019. (CR: 74). On March 17, 2020, the Fifth Court of Appeals determined that it lacked jurisdiction because Appellant's notice was not timely filed. *Anderson v. State*, No. 05-19-01492-CR, 2020 WL 1303265, at *1 (Tex. App.—Dallas Mar. 17, 2020, pet. granted) (mem. op., not designated for publication). This Honorable Court granted discretionary review on September 16, 2020. *Id*.

STATEMENT OF THE FACTS

The underlying facts of the case are not relevant to the procedural issues before this Court. Appellant's Statement of Facts is adequate and the State believes accurately represents the nature of the case.

ISSUES PRESENTED

Ground One:

> **Whether the ten-day grace period for filing a notice of appeal was unavailable when the incarcerated defendant omitted the words "district clerk" from the envelope he used to send his notice of appeal.**

Ground Two:

> **Under what circumstances should an incarcerated defendant be allowed factual development to show the clerk physically received his notice of appeal within the ten-day grace period?**

SUMMARY OF THE ARGUMENT

Appellant should not be allowed to avail himself of the ten-day grace period for filing a notice of appeal because he addressed his notice to the trial court and failed to comply with Texas Rule of Appellate Procedure 9.2(b), which requires a notice of appeal be addressed to the "proper clerk." No additional evidentiary questions regarding jurisdiction remain in this case because the record contains a clearly addressed envelope with a post-mark date of November 4, 2019. Even if additional evidentiary issues necessitated developing a record, filing a writ of habeas corpus would be the proper avenue for developing a record when jurisdiction no longer lies in the convicting trial court and does not yet lie in a higher court.

ARGUMENT AND AUTHORITIES

Response to Ground One:

> **The 10-day grace period is unavailable to an appellant when the notice of appeal is addressed and subsequently mailed to the trial court instead of the "the proper clerk" as required by Rule 9.2.**

In a criminal case, an appellate court's jurisdiction is invoked when a sufficient notice of appeal is timely filed. Tex. R. App. P. 25.2(b); *Olivo v. State*, 918 S.W.2d 519, 522 (Tex. Crim. App. 1996). Notice is sufficient if it shows the party's desire to appeal from the judgment or other appealable order. Tex. R. App. P. 25.2(c). Here, it is undisputed that Appellant was incarcerated and that he wished to appeal his conviction, thus the notice was sufficient. (CR: 75).

To be timely, a notice of appeal should be filed within thirty days of the day the trial court imposes sentence. Tex. R. App. P. 26.2(a)(1). If filed by United States Post, the "mailbox rule" applies, and a notice of appeal is considered timely if it is received within ten days after the filing deadline if 1) it is sent to the proper clerk, 2) it was placed in an envelope with proper postage, and 3) it was deposited into the mail before the last day for filing. Tex. R. App. P. 9.2(b). Intermediate courts cannot suspend the Rules of Appellate Procedure to extend the time limit for filing a notice of appeal. *Id.*; *Slaton v. State*, 981 S.W.2d 208, 209 (Tex. Crim. App. 1998) (per curiam).

Here, it is undisputed that Appellant's notice was mailed in an envelope addressed to "Dallas County Court #265, 133 N Riverfront blvd[sic], Dallas, Texas 75207" and post marked by the United States Postal Service on November 4, 2019. (CR: 75). However, even with the great latitude afforded incarcerated individuals, the Court of Appeals properly determined that Appellant failed to address the notice to the proper clerk as required by Rule 9.2(b). *Anderson*, 2020 WL 1303265, at *1. Appellant argues, in part, that because his notice was mailed before the deadline, his notice was timely filed under the "prisoner mailbox rule." "[U]nder the mailbox rule as it applies to prisoners ... a *pro se* inmate's pleading is deemed filed at the time the prison authorities duly receive the document to be mailed." *Taylor v. State*, 424 S.W.3d 39, 44 (Tex. Crim. App. 2014). The prisoner mailbox rule, however, is

generally subject to the requirements of Rule 9.2(b). *See Campbell v. State*, 320 S.W.3d 338, 342 (Tex. Crim. App. 2010). Because Appellant does not meet the requirements of Rule 9.2(b), he cannot avail himself of the "prisoner mailbox rule."

The term "proper clerk" should not be construed to encompass every person in the courthouse who receives mail under the principle of constructive possession.

Contrary to Appellant's assertions, the Court of Appeals did not "violate its duty" in construing Rule 9.2(b) because it properly followed this Honorable Court's decisions interpreting the phrase proper clerk to "include 'agents of the district clerk' and the clerk of the correct court of appeals," not the trial court. *Anderson*, 2020 WL 1303265, at *1; Appellant's Br. at p. 11. Appellant relies on *Moore* and *Taylor* to support his claim that it is only a "minor imperfection" if an incarcerated appellant "generally" addresses his notice of appeal to anyone with the same physical address as the proper clerk without identifying the proper clerk. He further claims the notice should be deemed filed at the time he hands it to the jail staff. Appellant's Br. at p. 11. Moreover, Appellant suggests that if the notice of appeal eventually makes its way to the proper clerk – regardless of time or address – courts should presume a document was timely filed by an incarcerated individual. Neither *Moore* or *Taylor* stand for these propositions. Indeed *Taylor* does not apply, and *Moore* is distinguishable.

In *Taylor*, this Court inferred that a missing envelope was addressed to the Court of Appeals because there was no envelope. *Taylor v. State*, 424 S.W.3d 39, 45

(Tex. Crim. App. 2014). Using that inference, the Court relied on Rule 25.2 (c) to determine that Taylor timely filed his motion under Rule 9.2 because Rule 25.2 requires the Court of Appeals to file mark the notice. *Id*. at 43. Unlike *Taylor*, in this case, there is a clearly marked envelope addressed to "Dallas County Court #265" that was filed with the notice of appeal on December 2, 2019. The only appropriate – and undisputed – inference that can be made in this case is that the envelope contained the notice. As such, the reasoning in *Taylor* does not apply to these facts. Moreover, unlike the duty imposed on the Court of Appeals, there is not such duty on the trial court. "Documents are generally to be filed with the clerk of the court; however a judge may accept filing of a paper by noting the filing date thereon and transmitting it to the clerk's office." *Garza v. State*, 919 S.W.2d 788, 789 (Tex. App.–Houston [14th Dist.] 1996, no pet.); *see also* Tex. R. App. P. 9.2(a)(2). No such notation is present on the notice Appellant sent.

In *Moore*, this Court determined that an envelope addressed to the "bond forfeiture clerk" on "2nd flr" was sufficient to be timely filed because two clerks' offices were on the second floor of the Frank Crowley Courts Building. *Moore v. State*, 840 S.W.2d 439, 440 (Tex. Crim. App. 1992). The *Moore* court reasoned that an employee who was tasked with processing and forwarding mail in the building could be considered an agent of the clerk because the envelope was "sufficiently

specific" for the document to be received in the proper place at the proper time. *Id*. at 441.

Taking into consideration that Moore actually addressed his envelope to the a clerk, some intermediate courts have interpreted "sufficiently specific" to mean the envelope must be addressed to a clerk, even if it is the wrong one. *See Turner v. State*, 529 S.W.3d 157, 159 (Tex. App.—Texarkana 2017, no pet) (distinguishing *Moore v. State*, holding that the plain language of Rule 9.2(b) requires the notice to be sent to the *proper clerk*, not the trial judge or one's attorney) (emphasis added); *see also Bowen v. State*, No. 05-19-01530-CR, 2020 WL 1042646, at *1 (Tex. App.—Dallas Mar. 3, 2020, no pet.) (mem. op., not designated for publication) (mailing notice to the judge of the trial court did not meet the requirements of Rule 9.2); *Rhodes v. State*, No. 05-16-00921-CR, 2017 WL 3587101, at *2 (Tex. App.—Dallas Aug. 21, 2017, no pet.) (mem. op., not designated for publication) (mailing notice of appeal to third-party agent for redelivery to trial court clerk does not comply with rule); *Patterson v. State*, No. 04-99-00953-CR, 2000 WL 190594, at *1 (Tex. App.—San Antonio Feb. 16, 2000, no pet.) (not designated for publication) (mail was not properly addressed to the appropriate filing clerk); *DeLaPaz v. State*, No. 03-98-00299-CR, 1998 WL 546338, at *1 (Tex. App.—Austin Aug. 31, 1998, no pet.) (not designated for publication) (envelope that was addressed to the court and not the clerk did not satisfy the rule).

But *Moore* does not address the issue here – how liberally should an intermediate court interpret "proper clerk" when addressing a jurisdictional issue of a *pro se* incarcerated individual. Appellant suggests this Court interpret this requirement to encompass constructive possession if an incarcerated appellant simply mails his notice to the courthouse before the deadline (prisoner mailbox rule). To do so undermines the requirements of Rule 9.2 and removes the "prisoner mailbox rule" from the requirements set out in the Rules of Appellate Procedure.

Appellant argues that the Court of Appeals failed to accommodate minor imperfections as to the recipient, claiming the address of the Frank Crowley Courts Building which houses eleven floors of courts and offices was sufficient for the building to be an agent of the district clerk. He makes this claim despite the fact that the word "clerk" does not appear on the envelope. Rule 9.2(b)(1)(A) specifically requires notice be sent to the proper clerk. Appellant's failure to address to the proper clerk – and his complete omission of the word "clerk" – is not a minor imperfection. He is bound by the express language of the Rule.

The trial court imposed Appellant's sentence October 7, 2019. (CR: 64). His notice of appeal was due thirty days later on November 6, 2019. In this case, the notice was mailed; therefore, Appellant's notice of appeal was due no later than November 16, 2019, if it met the requirement of Rule 9.2 (b)(1). Appellant's *pro se* notice of appeal was postmarked November 4, 2019. (CR: 76). The notice was not

filed with the District Clerk until December 2, 2019. (CR: 75). Contrary to Appellant's argument, the receiving department of the Frank Crowley Courts Building cannot be deemed an "agent of the district clerk" when the envelope was addressed to a court and not a clerk. Appellant sent to notice to the court of conviction rather than a clerk of any type – let alone the proper clerk. Therefore, the mailing was insufficient to invoke "the mailbox rule" in Rule 9.2, and Appellant's notice of appeal was untimely because it was entered fifty-six days after the judgment. Appellant's first ground should be overruled, and the opinion of the court of appeals upheld.

Response to Ground Two:

> **A writ of habeas corpus is available to a defendant to develop a record that the clerk physically received his notice of appeal within the ten-day grace period. Anything outside of a writ of habeas corpus would be improper because no court would have jurisdiction.**

Appellant argues that it is prudent to allow for "abatement hearings" rather than a writ of habeas corpus application seeking an out-of-time appeal when it is necessary "to present evidence that the District Clerk actually or constructively received the notice." Appellant's Br. p. 17-18. Appellant overlooks the fact that jurisdiction in the trial court ends thirty days after a judgment is entered or ninety days after judgment is entered if a motion for new trial is filed, and jurisdiction in a court of appeals does not begin until a notice of appeal is timely filed. Tex. R. App.

P. 26.2. Additionally, an appellate court lacks jurisdiction to hear an appeal in the absence of a timely notice of appeal. *Shute v. State,* 744 S.W.2d 96, 97 (Tex. Crim. App. 1988). In other words, a proceeding cannot be abated when no court has jurisdiction. The correct avenue to develop such a record in this case – or any – is through a writ of habeas corpus requesting an out-of-time appeal, which would re-establish jurisdiction in the trial court. Appellant has an appropriate avenue for obtaining an appeal. This Court should decline Appellant's request to identify other avenues for developing a record.

PRAYER

The State prays that this Honorable Court affirm the opinion of the court of appeals dismissing appellant's appeal.

Respectfully submitted,

/s/ M. Paige Williams

John Creuzot
Criminal District Attorney

M. Paige Williams
Assistant District Attorney
State Bar No. 24043997
133 N. Riverfront Blvd., LB-19
Dallas, Texas 75207-4399
(214) 653-3600

CERTIFICATE OF COMPLIANCE

I certify that this document contains 2,375 words, according to Microsoft Word 2016, exclusive of the sections excepted by Tex. R. App. P. 9.4(i)(1).

/s/ M. Paige Williams
M. Paige Williams

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing brief was served on Christian Souza, attorney for Appellant, on November 13, 2020, by electronic service to Christian.souza@dallascounty.org.

I certify that a true copy of the foregoing brief was served on the State's Prosecuting Attorney, Stacey Soule, on November 13, 2020, by electronic service to information@spa.texas.org

/s/ M. Paige Williams
M. Paige Williams

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Marcella Williams on behalf of Marcella Paige Williams
Bar No. 24043997
Marcella.Williams@dallascounty.org
Envelope ID: 48062728
Status as of 11/13/2020 1:42 PM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Marcella Williams		Marcella.Williams@dallascounty.org	11/13/2020 7:26:15 AM	SENT
stacy soule		information@spa.texas.gov	11/13/2020 7:26:15 AM	SENT

Associated Case Party: AndrewthomasAnderson

Name	BarNumber	Email	TimestampSubmitted	Status
Christian Souza		christian.souza@dallascounty.org	11/13/2020 7:26:15 AM	SENT